No. 80-1470

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In the Supreme Court of the United States

OCTOBER TERM, 1980

LUTHER T. PENNINGTON, and
SENATOR HARDING COLBERT,
Petitioners,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF TO MEMORANDUM IN OPPOSITION

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April, 1981

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The Solicitor General concedes that the search warrant was federal in character and was executed by an unauthorized person, stating at page 5 of his Memorandum for the United States in Opposition:

> "Because the warrant was issued by a Federal Magistrate in connection with a violation of federal law, we agree that the search was federal in character and thus subject to the requirements of Rule 41. . . . We also agree that Agent Means and the other state officers assisting him were not qualified to conduct the search under Rule 41(c)(1) without the presence of federal officers. See also 18 U.S.C. 3105. . . ."

This concession is tantamount to a confession of error under *18 U.S.C. 3105* because:

(1) The warrant was not executed by the person to whom it was directed;

(2) The warrant was not executed by a federal officer authorized by law to execute search warrants, and

(3) The warrant was not executed by some other person under (1) or (2) who was present and acting in the execution of the warrant.

The Solicitor General has not cited one case as authority for an unauthorized person to execute a search warrant. Rather, he has attempted to obfuscate the real issue by citing cases relating to the return of search warrants being ministerial acts.[1] The issue is the execution, not the return or the filing of the return of a search warrant.

A reading of the cases cited by the Solicitor General reveals the quotations cited either to be taken out of context and having no bearing on the issues at hand, or to actually sustain petitioners' complaints of error.

The execution by an unauthorized person renders the search illegal, and the suppression is mandated when a search warrant is executed by an officer not authorized by statute.[2]

The Florida Appellate Court in *Hesslerode* v. *Florida*, 369 So.2d 348 (1979), noted there was little case law on

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[1] *United States* v. *Dauphinee*, 538 F.2d 1 (1st Cir. 1976); *United States* v. *Dudek*, 530 F.2d 680 (6th Cir. 1976); *United States* v. *Hall*, 505 F.2d 961 (3rd Cir. 1974); *United States* v. *Burgard*, 551 F.2d 190 (8th Cir. 1977); *United States* v. *Garrett*, 565 F.2d 1065 (9th Cir. 1977); *United States* v. *Turner*, 558 F.2d 46 (2d Cir. 1977).

[2] *Perry* v. *United States*, 14 F.2d 88 (9th Cir. 1926); *Leonard* v. *United States*, 6 F.2d 351 (1st Cir. 1925); *United States* v. *Smith*, 16 F.2d 788 (S.D. Fla. 1926); *United States* v. *Deziadas*, 287 Fed. 837 (N.D. W.Va. 1923).

point concerning the execution of a search warrant by an unauthorized party, reasoning it was so basic that most law enforcement agencies comply with the obvious and plain directions. Based upon the *Fourth Amendment* from which they received *Section 12, Article 1* of the Florida Constitution, the Court held the search warrant to be fatally defective because it was directed to one category of peace officers and yet another category of police executed the warrant.

Just as the Solicitor General concedes that this Court in *Miller* v. *United States,* 357 U.S. 301, 78 S.Ct. 1190, 2 L.Ed.2d 1332 (1958), concluded a violation of *18 U.S.C. 3109* warranted suppression; petitioners submit that a violation of *18 U.S.C. 3105* likewise warrants suppression. Both statutes have constitutional underpinnings and are designed to protect an individual's reasonable expectation of privacy.

Contrary to the Solicitor General's assertion, petitioners suggest that all evidence was discovered as a result of the state officer's unauthorized and illegal act in executing the search warrant in violation of *18 U.S.C. 3105.*

Petitioners further suggest the unauthorized execution was illegal pursuant to *Rule 41(c) F.R.C.P.*[3], which has the force of statute pursuant to *18 U.S.C. 3771.*

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[3] A different test as to the applicability of Rule 41 to search warrants issued by a State Judge, rather than a U.S. Magistrate, was applied in *United States* v. *Burke,* 517 F.2d 377 (2d Cir. 1975). The prejudice is exemplified under the *Burke* doctrine by an examination of petitioners' photographs contained in the record before this Court, which depict the useless destruction of the premises searched. It should be further recognized that there was apparently federal participation in the execution and supervision of the search warrant in *Burke* [517 F.2d

CONCLUSION

The Solicitor General's concession that the state agents had no authority to execute the instant search warrant is a confession of error.

For the reasons above set forth, the petition should be summarily granted and a Writ of Certiorari should issue to the United States Court of Appeals for the Tenth Circuit reversing the convictions with directions to dismiss.

Respectfully submitted,

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[8] (Continued)

379 and 384]. The second distinctive doctrine of the *Burke* case was evidence of intentional and deliberate disregard of a provision in the Rule. This is also present in petitioners' case, and *United States* v. *Radlick*, 581 F.2d 225 (9th Cir. 1978), recognized the exclusionary rule may be imposed to assure the Federal Rules are obeyed, where no effort was made to comply on a State warrant wherein there was federal participation.

CERTIFICATE OF MAILING

I hereby certify that on the _____ day of April, 1981, three (3) true nd correct copies of the above and foregoing Reply Brief to Memorandum in Opposition were mailed via airmail, postage fully prepaid, return receipt requested, to: The Solicitor General, Department of Justice, Washington, D. C. 20530.

The above listed parties are all of the parties required to be served.

MAC OYLER